STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

vs

KENNETH JAY HOULIHAN,

Defendant-Appellant.

_____/

Supreme Court
No. 128340

Court of Appeals
No. 256534

Kent County Circuit
Court No. 01-02731-FC

128340

PLAINTIFF-APPELLEE'S BRIEF IN RESPONSE TO

APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF APPELLATE JURISDICTION

This matter is properly before the Court pursuant to the Court's September 23, 2005 order ordering briefing and oral argument on the defendant's application for leave to appeal. The People do not challenge that the defendant's application was timely filed from the Court of Appeals denial of leave to appeal, and that there are otherwise no jurisdictional defects in the defendant's present application.

STATEMENT OF QUESTION PRESENTED

-I-

HALBERT v MICHIGAN ANNOUNCED A NEW RULE OF CRIMINAL PROCEDURE. SHOULD THIS RULE BE RETROACTIVE ONLY TO CASES NOT FINAL AT THE TIME OF THE DECISION WHERE THE ISSUE WAS RAISED AND PRESERVED; AND SINCE THE DEFENDANT'S CASE WAS FINAL, SHOULD THE RULE OF HALBERT NOT APPLY TO HIS SUBSEQUENT MOTION FOR RELIEF FROM JUDGMENT?

The Trial Court did not address this question as stated.

Defendant-Appellant answers, "No."

Plaintiff-Appellee answers, "Yes."

-II-

HAS THE DEFENDANT PRESENTED NO BASIS ON WHICH THIS COURT SHOULD QUESTION THE VALIDITY OF HIS GUILTY PLEA?

The Trial Court did not address this question as stated.

Defendant-Appellant answers, "No."

Plaintiff-Appellee answers, "Yes."

STATEMENT OF FACTS

The defendant was charged with criminal sexual conduct first degree, MCL 750.520b. On April 24, 2001, he pled guilty as charged. He also pled in a separate case to child sexually abusive material, MCL 750.145c. (Plea, p 3) The charges arose out of an incident that occurred in 1997. The defendant admitted that he performed oral sex and anal sex on a 12-year-old boy, and that the boy performed oral sex on him. (Plea, pp 10-11) He also took photographs of the boy's genitals. (Plea, p 13)

The plea bargain called for dismissal of all other counts and another case in its entirety. (Plea, p 4) The defendant agreed that this was the entire plea bargain, and no other promises had been made to him. (Plea, p 10)

The defendant was sentenced on July 5, 2001 to a prison term of 20 to 40 years for criminal sexual conduct first degree and 160 months to 20 years for child sexually abusive material. (Sentence, pp 13-14) At sentencing, defense counsel argued that the victim impact statement was not prepared by the victim, that the victim was not terribly upset about the crime, and that the victim impact statement was "a fraud on the Court." (Sentence, p 4) The victim's father denied that the impact statement was the product of anyone other than his son. (Sentence, p 7)

Since the defendant pled guilty, he had no appeal of right. He asked for the appointment of appellate counsel; that request was denied. The defendant filed a pro se application for leave to appeals, which the Court of Appeals denied in an order dated January 2, 2003. See Court of Appeals Docket No. 242342. This Court denied leave to appeal in an order dated September 19, 2003; Justices Cavanagh and Kelly dissented, and said they would remand to the Court of

Appeals, and have the Court of Appeals remand to the Circuit Court for an order appointing counsel. People v Houlihan, 469 Mich 901 (2003).

The defendant then filed a motion for relief from judgment, MCR 6.500 et seq. The motion raised two issues: that his attorney had promised him a 10-year minimum sentence, and that his attorney was ineffective for not exposing a "fraud on the court" concerning the victim-impact statement. The trial court denied the defendant's motion. The defendant filed an application for leave to appeal to the Court of Appeals, which denied the application in an order dated February 10, 2005. The defendant's motion had not reiterated in the trial court his request for counsel. During the pendency of the Application for Leave to Appeal, the defendant filed a motion to remand for appointment of counsel, which motion was denied. The defendant then sought leave to appeal from this Court. On September 23, 2005, this Court ordered additional briefing and argument on whether the Court should grant leave or take other application, and to address whether Halbert v Michigan, 545 US ___; 125 S Ct 2582; 162 L Ed 2d 552 (2005) retroactively applies to motions from relief from judgment where a trial court denied a request for the appointment of counsel in the original direct appeal.

ARGUMENT I

HALBERT v MICHIGAN ANNOUNCED A NEW RULE OF CRIMINAL PROCEDURE. THIS RULE SHOULD BE RETROACTIVE ONLY TO CASES NOT FINAL AT THE TIME OF THE DECISION WHERE THE ISSUE WAS RAISED AND PRESERVED. SINCE THE DEFENDANT'S CASE WAS FINAL, THE RULE OF HALBERT SHOULD NOT APPLY TO HIS SUBSEQUENT MOTION FOR RELIEF FROM JUDGMENT.

Standard of Review. The retroactivity of a decision is an issue of law, and as such is reviewed de novo. Cardinal Mooney HS v MHSAA, 437 Mich 75, 80; 467 NW2d 21 (1991).

In Halbert v Michigan, 545 US ___; 125 S Ct 2582; 162 L Ed 2d 552 (2005), the United States Supreme Court held that a trial court is required to appoint appellate counsel for an indigent defendant who has pled guilty, to assist the defendant in preparing an application for leave to appeal in the Court of Appeals. The critical issues are whether Halbert announced a new rule of law, and whether the defendant's case was "final" for purposes of retroactivity analysis. If the answer to both questions is yes – as we maintain it is – then Halbert does not apply retroactively to the defendant's case.

Halbert involved a conflict between the principles announced in two prior United States Supreme Court cases. In Douglas v California, 372 US 353; 835 S Ct 814; 9 L Ed 2d 811 (1963), the Supreme Court held that, although a state is not required to establish a system of appellate review, if the state should do so the state also must provide counsel for an indigent defendant to prepare a first appeal of right. In Ross v Moffitt, 417 US 600; 94 S Ct 2437; 41 L Ed 2d 341 (1974), the Court held that counsel need not be appointed for a discretionary appeal. The discretionary appeal in Ross was an application for leave to appeal to a state supreme court, following an appeal of right to a state appellate court. The issue in Halbert was whether the

Michigan system, where there is no appeal of right for a defendant who pleads guilty, was more akin to Douglas (requiring the appointment of counsel) or Ross (not requiring the appointment of counsel). As the Court noted, the case was "framed by" Douglas and Ross. Halbert, 125 S Ct at 2590.

There had never been recognized a right to appointed counsel for a discretionary appeal. As the Supreme Court noted, "at the time he entered his plea, Halbert, in common with other defendant's convicted on their pleas, had no recognized right to appointed appellate counsel he could elect to forego." Id, p 2594. This Court had, in People v Bulger, 462 Mich 495; 614 NW2d 103 (2000), come to the conclusion that a defendant in appellant's position had no such right. The result in Halbert can hardly be viewed as some sort of foregone conclusion mandated by prior decisions of the Supreme Court.

Halbert did not itself address the issue of retroactivity. But in Teague v Lane, 489 US 288; 109 S Ct 1060; 103 L Ed 2d 334 (1989), the United States Supreme Court addressed the general rule of retroactivity for constitutional decisions. The issue in Teague involved the retroactivity of the rule against using peremptory challenges in a racially discriminatory manner, announced in Batson v Kentucky, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). The Court held that a decision announcing a "new rule" would be retroactive for any cases still pending on direct appeal where the issue had been properly preserved. But where a conviction was final – that is, where the defendant had sought relief and had been denied by the highest court of a state, and the time for filing a petition for a writ of certiorari had elapsed – the Court said the decision would not be retroactive.

The Court adopted the test first proposed by former Justice Harlan in Mackey v United States, 401 US 667, 682; 91 S Ct 1160, 1175; 28 L Ed 2d 404 (1971). Justice Harlan felt that a

new constitutional rule should not be applied retroactively to cases on collateral review, that such application could "be responsibly [determined] only by focusing, in the first instance, on the nature, function, and scope of the adjudicatory process in which such cases arise. The relevant frame of reference, in other words, is not the purposes of the new rule whose benefit the [defendant] seeks, but instead the purpose for which the writ of habeas corpus is made available." Justice Harlan focused on the nature of habeas corpus:

> "Habeas corpus always has been a collateral remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review. The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed." [Id., 401 US at 682-683, 91 S Ct at 1175 (emphasis in original)].

Justice Harlan also stated that he would recognize two exceptions to this rule, where full retroactivity would be given. One is where a new rule placed "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," id., 401 US at 692, 91 S Ct at 1180.[1] The second was where the new rule requires observance of "those procedures that . . . are 'implicit in the concept of ordered liberty,'" id., 401 US at 693, 91 S Ct at 1180, quoting Palko v Connecticut, 302 US 319, 325; 58 S Ct 149; 82 L Ed 288 (1937). The

[1] The Supreme Court later clarified that this first exception is more accurately characterized as "substantive rules not subject to the bar," where full retroactivity is granted because a new rule will "necessarily carry a significant risk that a defendant stand convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him. Schirro v Summerlin, 542 US 348; 124 S Ct 2519, 2522-2523; 159 L Ed 2d 2519 (2004), citing Bousley v United States, 523 US 614; 118 S Ct 1604; 140 L Ed 2d 828 (1998), quoting Davis v United States, 417 US 333; 94 S Ct 2298; 41 L Ed 2d 109 (1974).

Teague Court accepted the first exception, but modified the second, limiting the exception to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." Teague, 489 US at 313; 109 S Ct at 1077.

One issue, of course, is what constitutes a "new rule." The Teague Court said

> "It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or Federal Government. . . . To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction becomes final." [Id., 489 US at 301; 109 S Ct at 1070) (emphasis in original]

In Beard v Banks, 542 US 406; 124 S Ct 2504; 159 L Ed 2d 494 (2004), the Court reiterated that a state conviction was "final" for purposes of the Teague rule when the availability of direct review to the state court had been exhausted and the time for filing a petition for a writ of certiorari had elapsed or a timely filed petition had been denied. The issue in Beard involved a capital sentencing scheme that required juries to disregard mitigating factors that the jury did not unanimously find to exist. The defendant in Beard had sought further post-conviction review in Pennsylvania courts after his first certiorari petition was denied, and an intervening case in his favor had been decided. The Court held that a judgment is final "despite the possibility that a state court might, in its discretion, decline to enforce an available procedural bar and close to apply a new rule of law." Id., 124 S Ct at 2511.

The Beard Court said that a rule of criminal procedure would not be new if "the unlawfulness of [defendant's] conviction was apparent to all reasonable jurists." Id., 124 S Ct at 2511. It is not new where a reasonable jurist would "have felt compelled to adopt the rule,"

O'Dell v Netherland, 521 US 151, 164; 117 S Ct 1969; 138 L Ed 2d 351 (1977) (emphasis in original). But where reasonable jurists could have differed whether precedent compels a sought for rule, the rule must be considered new for purposes of a Teague analysis. See Humphress v United States, 398 F3d 855 (CA 6, 2005) (rule invalidating the federal sentencing guidelines as unconstitutional is a new rule, not to apply retroactively to cases final at the time of the decision).

The Beard Court also emphasized the limitation on the second of the Teague exceptions. The Court noted that, since this exception would apply only to issues central to an accurate determination of innocence or guilt, "it should come as no surprise that we have yet to find a new rule that falls under the second Teague exception." Id., 124 S Ct at 2513. The Court did note that the rule of Gideon v Wainwright, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963), providing the right to counsel at trial for indigents, was one to which they had repeatedly referred as implicating the second exception, but the Court also observed that this right was necessary to insure a fair trial, and that "we have not hesitated to hold that less sweeping and fundamental rules do not fall within Teague's second exception," including several rules in capital sentencing proceedings. Beard, 124 S Ct at 2514.

In the case at bar, the defendant's conviction became "final" for purposes of retroactivity analysis when this Court denied his original leave to appeal and the time for filing a petition for a writ of certiorari had expired. The present case comes before this Court in an application following denial of a motion for relief from judgment. There can be no doubt that, under a Teague retroactivity analysis, the defendant's present conviction was indeed final when he filed his motion for relief from judgment in the Kent County Circuit Court, well before the decision in Halbert.

The finality argument cannot be defeated by the claim that the present case arises from an attack in the court of conviction. In People v Ingram, 439 Mich 288, 291, n 1; 484 NW2d 241 (1992), this Court defined a "collateral attack" as a challenge to a conviction "raised other than by initial appeal of the conviction in question." As this Court observed in People v Ward, 459 Mich 602, 611; 594 NW2d 47 (1999), "long delayed 'direct' attacks on convictions may be viewed as collateral attacks. But regardless of the label one affixes to such long-delayed challenges, it is entirely appropriate that a much higher standard be applied to a defendant who seeks relief from a judgment long after the conviction." Just as labeling a motion for relief from judgment "collateral" does not per se bar relief, People v Edwards, 465 Mich 964; 640 NW2d 261 (2002), labeling such a motion as a "direct" attack does not provide retroactive application of a new rule where the conviction, for appellate purposes, was final.

In its order of September 23, 2005, this Court suggested the parties consider several cases, including Howard v United States, 374 F3d 1068 (CA 11, 2004). In Howard, the Court held that the rule of Alabama v Shelton, 535 US 654; 122 S Ct 1764; 152 L Ed 2d 888 (2002), precluding the use of a prior uncounseled state conviction where a defendant had received a suspended sentence, would apply retroactively to a case on collateral review. The defendant in Howard had pled guilty in federal court to bank robbery. Two prior convictions, for which he had not been represented by counsel and had received a suspended sentence, were considered in sentencing. More than a year after sentence, but within a year of the Shelton decision, the defendant filed a motion to vacate sentence.

Much of the discussion of Howard concerned whether a Gideon defect is a "jurisdictional" defect not subject to procedural default rules. The Supreme Court had in the past referred to the failure to appoint counsel for an indigent as a "unique constitutional defect . . .

ris[ing] to the level of a jurisdictional defect." Lackawanna County Dist Attorney v Coss, 532 US 394, 404; 121 S Ct 1567, 1574; 128 L Ed 2d 517 (1994). But the Howard Court noted that, while the nature of a Gideon violation was such that the Supreme Court was willing to allow the defect to be raised collaterally in a sentencing proceeding, the Court had not shown "a willingness to disregard applicable procedural defenses, one of which arises from the failure to raise the claim in the sentencing proceeding." Howard, 374 F3d at 1072. The result was that the claim was procedurally barred – except that the government had failed to raise the claim of procedural default in the district court. The Court thus did not apply procedural default rules and went on to address the merits of the defendant's claim.[2]

The Court noted that 28 USC § 2255 provided a one year limitation on the filing of habeas corpus claims. This period runs from the later of the date on which the judgment of conviction became final, or the date on which the right asserted was recognized by the Supreme Court and made retroactively applicable to cases on collateral review. The Court concluded that the right in Shelton was a new rule. It was not dictated by prior precedent, was "susceptible to debate among reasonable minds," 374 F2d at 1077. The Court then turned to the issue of retroactivity under Teague.

The Court found that every extension of Gideon had been applied retroactively to collateral proceedings by the Supreme Court. Id. As the Court conceded, all of those decisions predated Teague. Nonetheless, the Court found that "the Supreme Court has never distinguished between different contexts in judgment whether an extension of the right to counsel should be

[2] While not directly in issue in the case at bar, this does call into question this Court's holding in People v Carpentier, 446 Mich 19, 28-29; 521 NW2d 195 (1994), that a Gideon violation is a "jurisdictional" defect to which the normal standards of cause and prejudice in motions for relief from judgment will not apply.

made retroactive," and that "the right to counsel is a bedrock procedural element for Teague purposes." 374 F2d at 1078.

There are numerous problems with the Howard reasoning. First, the case at bar, as all the Halbert cases, deals with a defendant who (1) was represented by counsel when he pled guilty, and (2) entered into a voluntary guilty plea. The right to counsel at trial is critical to a fair determination of a case. The right to counsel on appeal after a trial, where there may present numerous issues concerning the fairness of a criminal adjudication, is important, though not as critical as the right to counsel at trial.[3] But a defendant who has pled guilty, while represented by counsel, and who has admitted his guilt under oath, is in a far different posture. There is no basis on which to question the accuracy of the defendant's conviction.

As the United States Supreme Court has observed many times, from Ross to Douglas and again in Halbert, there is no constitutional requirement for a state to provide for an appeal of any sort. It would be strange to conclude that the right to counsel after a guilty plea is a "bedrock principle" affecting a fair determination of a defendant's guilt or innocence where the defendant himself has made that determination moot by his agreement to plead guilty.

It also appears that the Howard Court was confusing retroactive application of a decision to a case that had not yet become final for appellate purposes to retroactive application of the decision to cases where the judgment was final. Howard cited McConnell v Rhay, 393 US 2; 89 S Ct 32; 21 L Ed 2d 2 (1968) for the proposition that Douglas had been given retroactive effect; but that decision involved the retroactive effect of Mempa v Rhay, 389 US 128; 88 S Ct 254; 19

[3] As an example, defense counsel at a trial would not be allowed to concede his client's guilt on all charges and present no defense, but counsel on appeal can advise a court that there are no appealable issues to be raised, see Anders v California, 386 US 738; 87 S Ct 1396; 18 L Ed 2d 493 (1967).

L Ed 2d 5 (1968), which recognized the right to counsel at probation revocation hearings. The issue in McConnell was whether Mempa would be retroactive to cases where probation was revoked before Mempa was decided. That is not the issue. The question in the case at bar is not whether Halbert applies to a defendant who was denied counsel before Halbert, and whose application for leave to appeal was pending in the Court of Appeals at the time Halbert was decided. A new rule, found to be required by the United States Constitution, applies to cases pending on direct review that are not yet final, Griffith v Kentucky, 479 US 314, 328; 107 S Ct 708; 93 L Ed 2d 649 (1987). But the defendant's challenge here arises not on direct review, but in an appeal from a motion from relief from judgment after his original appellate remedies had been exhausted or abandoned. In other words, the limited retroactivity to a case pending on direct review cannot be confused with the more expansive retroactivity that the defendant seeks in the case at bar.

This mistake has been made by other courts as well. For example, in Breen v Beto, 421 F2d 945 (CA 5, 1970), the Fifth Circuit held that Douglas v California, supra, would have full retroactive effect. But the Breen Court opined that Stovall v Denno, 388 US 293; 87 S Ct 1967; 18 L Ed 2d 199 (1967) "clearly indicates" that Douglas should have retroactive effect. Stovall actually involved whether constitutional identification rules would be given retroactive effect, though the Court did state in passing that Douglas had been given retroactive effect, 87 S Ct at 1970. But Douglas itself was a case where certiorari had been granted after a direct appeal to the California Court of Appeals and denial of further review of that direct appeal from the California Supreme Court – in short, a case that was not "final" for purposes of the Teague rule on retroactivity.

We have in our research found one case that cites both Halbert and Teague, albeit in a different factual context. In Hernandez v Greiner, 414 F3d 266 (CA 2, 2005), the defendant, after his state court conviction was affirmed on appeal, filed for a discretionary appeal to the New York Court of Appeals. Leave was granted. But appellate counsel in the first appeal failed to perfect the appeal under New York rules, so the appeal was dismissed. The issue on habeas corpus was whether a constitutional right to counsel to a discretionary appeal after leave has been granted would be a new rule under Teague. The Court held that it was, and not available to a defendant seeking habeas relief. The Court also found that the second Teague exception would not apply "to a rule requiring counsel on a second-level discretionary appeal after leave to take such an appeal was granted." 414 F3d at 270.

The People submit that, under Teague, the decision in Halbert would be a new rule. It would have limited retroactive effect, to cases pending on direct appeal where the issue was properly preserved by a request for counsel, but should not apply to cases like the case at bar, where the judgment was final for purposes of retroactive application. Given that the defendant pled guilty, and that the lack of counsel in his initial application for leave to appeal could in no way have called into question the validity of the fact-finding process, the Halbert rule cannot be held to implicate the second Teague exception, an exception that the United States Supreme Court has yet to apply to a single case.

There remains, of course, one final question: whether this Court should apply the Teague analysis to post-conviction attacks on convictions not part of an original appeal. The People submit that there is no principled reason for this Court to apply United States Supreme Court decisions more expansively than the United States Supreme Court has done.

In People v Hampton, 384 Mich 669; 187 NW2d 404 (1971), this Court applied a three-part test of retroactivity that assesses (1) the purpose of the new rule, (2) the general reliance on the old rule, and (3) the effect of retroactive application of the new rule on the administration of justice. In People v Sexton, 458 Mich 43; 580 NW2d 404 (1998), this Court applied the Hampton factors and held that People v Bender, 452 Mich 594; 551 NW2d 71 (1996), requiring the police to inform a suspect when retained counsel is available for consultation, and decided while the defendant's direct appeal was pending, would not apply retroactively at all. This Court cited Teague for the proposition that a rule is "new" where it was not dictated by precedent existing at the time the defendant's conviction became final. Sexton, 458 Mich at 61, n.42. The Court noted as well that the new rule "is not relevant to the ascertainment of guilt or innocence and does not implicate the integrity of the fact-finding process." Id., 458 Mich at 62. The Court noted that there had been considerable reliance on the old rule (one that was in conformity with United States Supreme Court precedent), and noted that retroactive application "would be extremely disruptive to the administration of justice." Id., 458 Mich at 67. Those same concerns apply here: the rule of Halbert is new, and the old rule was relied upon in numerous cases where trial judges, following this Court's holding in Bulger, supra, properly denied appellate counsel to defendants who had pled guilty. And applying Halbert retroactively will result in the investment of substantial sums of money for the appointment of counsel, where the guilt of innocence of a defendant is simply not in question, and a large influx of cases to the Court of Appeals to review sentences that were within calculated guidelines and where there was no objection to the guidelines.

Under Hampton and Sexton, this Court would be justified in finding that Halbert has no retroactive application at all. Under Teague, it likely should have limited retroactive application – but not to cases where the judgment was final.

Motions for relief from judgment are primarily designed to permit defendants to challenge convictions or sentences where there was a clear legal error committed. An issue that might result in reversal of a conviction if raised on direct appeal will not justify the grant of a motion for relief from judgment. See e.g. People v Brown, 196 Mich App 153; 492 NW2d 770 (1992) (erroneous jury instructions in an assault with intent to commit murder case). A motion for relief from judgment may not be granted where an issue could have been raised in an earlier appeal, unless a defendant shows both cause and "actual prejudice" from the failure to raise the issue earlier. "Actual prejudice" means, in a conviction after a trial, a reasonable likelihood of acquittal but for the error; in a conviction after a guilty plea, that the defect was such that it renders the plea involuntary to a degree that it would be manifestly unjust to allow the conviction to stand; in a challenge to the sentence, that the sentence is invalid; or in any case that the irregularity is "so offensive to the maintenance of a sound judicial system that the conviction should not be allowed to stand regardless of its effect on the outcome of the case." MCR 6.508(D). If old rules that did exist at the time of the defendant's conviction cannot be routinely raised, it would be incongruous to say that new rules, which came into effect only after the defendant's initial appeal was completed, could be raised.

In sum, the People submit that, under Teague v Lane, the United States Supreme Court holding in Halbert does not apply to cases such as the one at bar, where the conviction was final for retroactivity purposes at the time Halbert was decided.

ARGUMENT II

THE DEFENDANT HAS PRESENTED NO BASIS ON WHICH THIS COURT SHOULD QUESTION THE VALIDITY OF HIS GUILTY PLEA.

Standard of Review. The decision to grant or deny a motion for relief from judgment is reviewed for an abuse of discretion. People v McSwain, 259 Mich App 654; 676 NW2d 236 (2003).

While the primary issue of interest in this matter is the retroactivity issue of Argument I, the case is also before this Court on the defendant's two substantive claims of error. Neither provides a basis for the grant of relief.

The defendant alleges that he was promised a sentencing agreement. But he was put under oath before he pled guilty. He acknowledged on the record in open court that the only promise made to him was the plea bargain. Not only is there a dearth of record support for the defendant's claim; there is record support that belies that claim. As noted by the Court of Appeals in People v Chester Davis, 41 Mich App 224, 225-226; 200 NW2d 109 (1972), "[i]t is difficult to know how a trial judge can protect himself and his record on plea acceptance other than by asking a defendant whether any inducements or promises have been made to him. If the affidavit of defendant . . . standing alone, mandates an 'evidentiary hearing," then no plea negotiated or otherwise is inviolate in our state." And in People v Serr, 73 Mich App 19, 28; 250 NW2d 535 (1976), the Court held that a defendant will not be permitted to contradict his own statements at a guilty plea by claiming additional inducements caused his plea. The defendant's motion would be properly denied without evidentiary hearing even if he raised it timely. The trial court was justified in rejecting this claim out of hand when first raised in a motion for relief from judgment.

The defendant claims that the victim in this case committed a fraud on the court. As near as we can tell, the defendant's theory is that the victim's affidavit appeared to be written by the victim's father, and only signed by the victim. The defendant assumes that this somehow constitutes fraud. The argument is frivolous. Nothing precludes a person from signing, and by so doing verifying, an affidavit of facts that was prepared by another person. In any event, this is irrelevant to the defendant's guilt. It might in theory go to sentencing. But the defendant does not challenge the length of his sentence, and has presented nothing that calls into question the validity of the sentence.

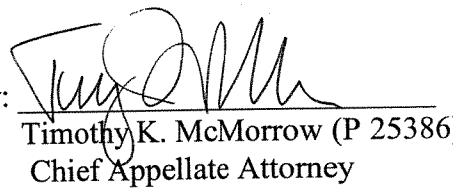
RELIEF REQUESTED

WHEREFORE, for the reasons stated herein, the People respectfully pray that the this Court either (1) deny leave to appeal, or (2) issue an opinion finding that the United States Supreme Court opinion in Halbert v Michigan does not apply retroactively to cases where the judgment was final and no longer subject to direct appellate review.

Respectfully submitted,

William A. Forsyth (P 23770)
Kent County Prosecuting Attorney

Dated: October 21, 2005

By: 
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